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LEMBAGA TATATERTIB PEGUAM-PEGUAM

v.

WAN MOHD NAZRI WAN HASSAN

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FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ABDUL AZIZ MOHAMAD FCJ
AZMEL MAAMOR FCJ
[CIVIL APPEAL NO: 02-45-2006 (W)]

C

28 FEBRUARY 2007

LEGAL PROFESSION: *Professional discipline - Misconduct - Disciplinary proceeding, procedure - Whether Disciplinary Board could forthwith appoint Disciplinary Committee to deal with complaint of*

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misconduct against advocate and solicitor - Whether must first appoint Investigating Tribunal to inquire into complaint - Legal Profession Act 1976, ss. 94, 95, 99, 100, 102, 103A, 103B, 103C

WORDS & PHRASES: *"Determines" - Legal Profession Act 1976, s. 103A(a) - Import and purport - Whether denotes making of*

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independent decision by Disciplinary Board - Whether vesting Disciplinary Board with independent and distinct power to appoint Disciplinary Committee forthwith in circumstance mentioned in para (a) of s. 103A

This was an appeal against the decision of the Court of Appeal

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ruling that the appellant Disciplinary Board, in proceeding with a complaint concerning the conduct of an advocate and solicitor, is not empowered to appoint forthwith a Disciplinary Committee pursuant to s. 103A(a) of the Legal Profession Act 1976 (as unamended by Act A1269) ('LPA'), without first appointing an

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Investigating Tribunal to inquire into the complaint and submit a report thereon pursuant to s. 100(1) LPA. It was the view of the Court of Appeal that such a construction of s. 103A(a) was warranted, considering the absence of express provisions in the LPA setting out the types of complaint where the Disciplinary

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Board could straight away act under the section and appoint a Disciplinary Committee. It was the appellate court's further view that "whether there should be a formal investigation or not as envisaged by s. 103A(a) of the Act it must be subject to a report made by the Investigating Tribunal under s. 102(2) of the Act".

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The appellant nonetheless contended that the Disciplinary Board

had an unfettered discretion to act under the said s. 103A(a), and in the circumstances, having obtained leave to appeal, posed the following question to the justices of the Federal Court, namely: "whether, on the express provisions under s. 103A and 103B of the LPA, the Disciplinary Board is vested with an independent and distinct power to appoint a Disciplinary Committee forthwith under any one of the circumstances as set out in s. 103LPA?".

Held (allowing the appeal)
Per Abdul Aziz Mohamad FCJ delivering the judgment of the court:

(1) The respondent rightly accepted, as the High Court and the Court of Appeal rightly thought, that in the circumstances mentioned in paras (b) and (c) of s. 103A, the Disciplinary Board may appoint a Disciplinary Committee directly without first constituting an Investigating Tribunal under s. 100(1). That being so, the question that we had to answer actually turned on the circumstance in paragraph (a) of s. 103A. We answered the question in the affirmative and allowed the Disciplinary Board's appeal. (para. 12)

(2) It was for a combination of three reasons that we were of opinion that in the circumstance in para (a) of s. 103A, the Disciplinary Board is vested with "an independent and distinct" power to appoint a Disciplinary Committee, ie. a power that is independent of and distinct from its power and duty under s. 102(2) to appoint a Disciplinary Committee, which arises only after the Investigating Tribunal has made its report and which therefore cannot arise unless an Investigating Tribunal has been constituted. (para 13)

(2a) The first reason is that the requirement of s. 103A is a requirement that applies equally to each of the circumstances in paras (a), (b) and (c) thereof. Since the power to appoint that is implicit in that requirement is independent of and distinct from the power to appoint under s. 102(2) where the circumstances in paras (b) and (c) are concerned, it must be so too where the circumstance in para (a) is concerned. (para 14)

(2b) The second reason relates to the use of the word "determines" in para (a) of s. 103A. The Disciplinary Board determines that there should be a formal investigation. Be it as it may, a look at s. 102(2) shows that it has two paragraphs. Under para (a) the Disciplinary Board is bound to constitute a Disciplinary Committee if the Investigating Tribunal recommends that there should be a formal investigation. There is no question under that paragraph of the Disciplinary Board determining that there should be a formal investigation. Under para (b) the Disciplinary Board is given the discretion to nevertheless appoint a Disciplinary Committee, even where the Investigating Tribunal recommends that a formal investigation is not necessary, if it disagrees with the recommendation. Of course the disagreement with recommendation means that the Disciplinary Board takes the view that a formal investigation is necessary – but para (b) does not speak of the Disciplinary Board determining that there should be a formal investigation. This being the case, we were of the view that the word "determines" in para (a) of s. 103A is intended to denote the making of a decision by the Disciplinary Board on its own volition and not as a response under s. 102(2) to a recommendation of the Investigating Tribunal. (para 15)

(2c) The third reason lies in s. 103B(1). Section 103B is basically intended to set out the composition of the Disciplinary Committee, which has not been set out before, whereas the composition of an Investigating tribunal has been set out in s. 100(2). As the duty to appoint a Disciplinary Committee has been laid down in ss. 102(2) and 103A, s. 103B(1) is basically intended to be a recapitulation of the instances, already laid down in ss. 102(2) and 103A, when the Disciplinary Board "shall" appoint a Disciplinary Committee, coupled with a statement of what the Disciplinary Committee has to do. Section 103B(1) looks to two instances of appointment in terms of the purpose of an appointment. One instance is that of an appointment of a Disciplinary Committee to consider the report of the Investigating Tribunal. That applies "in cases where an Investigating Tribunal has been appointed" and those have to be cases

where the appointment was pursuant to s. 102(2). The other instance is that of an appointment of a Disciplinary Committee to investigate and make recommendations to the Disciplinary Board in respect of cases under s. 103A. There is one or two respects of want of inconsistency between s. 103B(1) on the one hand and ss. 102(2) and 103A on the other, but the inconsistencies did not retract from the fact that s. 103B(1) is intended to refer back to s. 102(2) and 103A. The important thing to note from s. 103B(1) for the question in the appeal is that, the first instance is of "cases where an Investigating Tribunal has been appointed". That means that the second instance, that of "cases under s. 103A", that is cases under all the three circumstances of the section, including the circumstance in para (a) thereof, are not cases where an Investigating Tribunal has been appointed. (para 16)

(3) The independent and distinct power of the Disciplinary Board to appoint a Disciplinary Committee in the circumstance of para (a) of s. 103A means that where the Disciplinary Board receives a complaint concerning the conduct of an advocate and solicitor, it has an unfettered discretion to determine that there should be a formal investigation and to straight away appoint a Disciplinary Committee for the purpose and is not bound under s. 100(1) to "forthwith constitute an Investigating Tribunal" to make recommendations to it as to whether or not there should be a formal investigation by a Disciplinary Committee. (para 17).

(4) Once it is accepted that the Disciplinary Board has an unfettered discretion to act under s. 103A, the concern as expressed by the Court of Appeal, namely the absence of express provisions setting out the types of complaint to deal with which the Disciplinary Board may straight away act under s. 103A(a), would not arise. (para 17).

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan kerana memutuskan bahawa perayu Lembaga Disiplin, dalam menangani aduan mengenai kelakuan seorang peguambela dan peguamcara, tidak mempunyai kuasa untuk terus melantik Jawatankuasa Disiplin di bawah s. 103A(a) Akta Profesion Undang-Undang 1976 (sebelum pindaan oleh Akta A1269) ("APU"), tanpa terlebih

dahulu melantik Tribunal Penyiasat untuk menyiasat aduan dan membuat laporan mengenainya di bawah s. 100(1) APU. Menurut pandangan Mahkamah Rayuan, pentafsiran s. 103A APU yang sebegitu rupa adalah wajar memandangkan ketiadaan peruntukan jelas di dalam APU yang membentangkan jenis-jenis aduan di mana Lembaga Disiplin boleh terus bertindak di bawah seksyen tersebut dan segera melantik Jawatankuasa Disiplin. Menurut Mahkamah Rayuan lagi "sama ada suatu penyiasatan formal perlu dibuat ataupun tidak seperti yang dikatakan oleh s. 103A(a) Akta ianya hendaklah tertakluk kepada laporan yang dibuat oleh Tribunal Penyiasat di bawah s. 102(2) Akta". Walau apapun, perayu berhujah bahawa Lembaga Disiplin mempunyai kebebasan budibicara untuk bertindak di bawah s. 103A(a) tersebut, dan dalam keadaan sedemikian, setelah mendapat izin untuk merayu, telah mengemukakan persoalan berikut kepada hakim-hakim Mahkamah Persekutuan, iaitu: "sama ada, atas peruntukan ekspres ss. 103A dan 103B APU, Lembaga Disiplin mempunyai kuasa yang bebas dan tersendiri untuk melantik Jawatankuasa Disiplin secara terus di bawah mana-mana keadaan yang dibentang di bawah s. 103 APU?".

Diputuskan (membenarkan rayuan)
Oleh Abdul Aziz Mohamad HMP menyampaikan penghakiman mahkamah:

(1) Sepertimana pandangan yang diutarakan oleh Mahkamah Tinggi dan Mahkamah Rayuan, responden telah menerima dengan betulnya bahawa dalam halkeadaan seperti yang disebut di perenggan-perenggan (b) dan (c) s. 103A, Lembaga Disiplin boleh secara terus melantik Jawatankuasa Disiplin tanpa perlu terlebih dahulu menubuhkan Tribunal Penyiasat di bawah s. 100(1). Oleh yang demikian, soalan yang perlu dijawab oleh kami adalah berhubung halkeadaan di bawah perenggan (a) s. 103A. Kami menjawab soalan ini secara afirmatif dan membenarkan rayuan Lembaga Disiplin.

(2) Terdapat tiga alasan mengapa kami berpendapat bahawa dalam halkeadaan di perenggan (a) s. 103A Lembaga Disiplin diberikan kuasa yang "bebas dan tersendiri" untuk melantik Jawatankuasa Disiplin, iaitu kuasa yang bebas dan terasing dari kuasanya untuk melantik Jawatankuasa Disiplin di bawah s. 102(2), yang hanya berbangkit selepas Tribunal Penyiasat membuat laporannya dan kerana itu tidak boleh berbangkit kecuali setelah Tribunal Penyiasat ditubuhkan.

(2a) Alasan pertama adalah kehendak s. 103A adalah merupakan kehendak yang terpakai kepada setiap satu halkeadaan yang dibentang di dalam perenggan-perenggan (a), (b) dan (c) seksyen tersebut. Oleh kerana kuasa untuk melantik yang terserlah di dalam kehendak tersebut adalah bebas dan terasing dari kuasa untuk melantik di bawah s. 102(2) setakat yang berkaitan dengan perenggan-perenggan (b) dan (c), kedudukannya haruslah sama setakat yang berkaitan dengan perenggan (a).

(2b) Alasan kedua berkait dengan penggunaan perkataan "memutuskan" di dalam perenggan (a) s. 103A. Lembaga Disiplin memutuskan bahawa harus ada suatu penyiasatan yang formal. Apapun, melihat kepada s. 102(2) menunjukkan bahawa terdapat dua perenggan pada seksyen tersebut. Di bawah perenggan (a) Lembaga Disiplin wajib menubuhkan Jawatankuasa Disiplin jika Tribunal Penyiasat mencadangkan bahawa satu siasatan formal perlu dijalankan. Maka di bawah perenggan ini tidak timbul soal Lembaga Disiplin memutuskan satu siasatan formal perlu dijalankan. Di bawah perenggan (b) Lembaga Disiplin mempunyai budibicara untuk melantik Jawatankuasa Disiplin sekalipun jika Tribunal Penyiasat mencadangkan satu siasatan formal tidaklah perlu, sekiranya ia tidak bersetuju dengan cadangan. Memanglah tidak bersetuju dengan cadangan bermakna Lembaga Disiplin mengambil pandangan bahawa satu siasatan formal adalah perlu – namun perenggan (b) tidak bercakap mengenal Lembaga Disiplin memutuskan bahawa satu siasatan formal harus diadakan. Oleh hal yang demikian, kami berpendapat bahawa hasrat perkataan "memutuskan" di dalam perenggan (a) s. 103A adalah untuk merujuk kepada pembuatan keputusan oleh Lembaga Disiplin atas kehendaknya tersendiri dan bukan sebagai tindak balas terhadap cadangan Tribunal Penyiasat di bawah s. 102(2).

(2c) Alasan ketiga terserlah dari s. 103B(1). Seksyen 103B pada asasnya bertujuan membentangkan komposisi Jawatankuasa Disiplin, yang belum lagi dibuat, sementara komposisi Tribunal Penyiasat dibentang di s. 100(2). Oleh kerana tanggungjawab untuk melantik Jawatankuasa Disiplin diperkatakan oleh ss. 102(2) dan 103A, maka s. 103B(1) adalah pada asasnya untuk mengimbas kembali akan

keadaan-keadaan, yang sudahpun diperkata oleh ss. 102(2) dan 103A, di mana Lembaga Disiplin "hendaklah" melantik Jawatankuasa Disiplin, ditambah dengan kenyataan tentang apa yang Jawatankuasa Disiplin perlu lakukan. Seksyen 103B(1) melihat kepada dua keadaan perlantikan dalam konteks tujuan-tujuannya. Keadaan pertama adalah mengenai perlantikan Jawatankuasa Disiplin untuk menimbang laporan Tribunal Penyiasat. Itu terpakai kepada "kes-kes di mana Tribunal Penyiasat telah dilantik" yang bererti kes-kes di mana perlantikan adalah di bawah s. 102(2). Keadaan kedua adalah mengenai perlantikan Jawatankuasa Disiplin untuk menyiasat dan membuat cadangan ke Lembaga Disiplin bagi kes-kes di bawah s. 103A. Terdapat satu atau dua sudut yang tidak konsisten di antara s. 103B(1) di satu pihak dan s. 103A di pihak yang lain, namun ketidak-konsistenan tersebut tidak mengubah fakta bahawa s. 103B(1) harus bersandar kepada ss. 102(2) dan 103A. Berkaitan persoalan di dalam rayuan, perkara penting yang perlu diperhatikan dari s. 103B(1) adalah bahawa, keadaan pertama adalah berkaitan "kes-kes di mana Tribunal Penyiasat telah pun dilantik". Ini bermakna keadaan kedua, yang menyentuhi "kes-kes di bawah s. 103A", iaitu kes-kes di bawah ketiga-ketiga keadaan seksyen tersebut, termasuk keadaan di perenggan (a), bukanlah kes di mana Tribunal Penyiasat telah dilantik.

(3) Kuasa Lembaga Disiplin untuk melantik Jawatankuasa Disiplin yang bebas dan tersendiri dalam keadaan di peranggan (a) s. 103A bermakna bahawa di mana Lembaga Disiplin menerima aduan tentang tata laku seorang peguambela dan peguamcara, ia mempunyai budibicara penuh untuk memutuskan sama ada satu penyiasatan formal harus dijalankan dan seterusnya melantik Jawatankuasa Disiplin untuk tujuan itu dan ia tidaklah tertakluk kepada s. 100(1) untuk "dengan segera menubuhkan sebuah Tribunal Penyiasatan" untuk membuat cadangan kepadanya sama ada atau tidak satu penyiasatan formal perlu diadakan oleh Jawatankuasa Disiplin.

(4) Sebaik ianya diterima bahawa Lembaga Disiplin mempunyai budibicara penuh untuk bertindak di bawah s. 103A, maka kebimbangan yang disuarakan Mahkamah Rayuan, iaitu bahawa tidak ada peruntukan jelas yang mengenalpasti jenis aduan di mana Lembaga Disiplin boleh terus bertindak di bawah s. 103A(a), sama sekali tidak berbangkit.

Legislation referred to:
Legal Profession Act 1976, ss. 94, 95, 99(1), 100(1), (2), 101(1), 102(1), (2), 103A, 103B, 103C, 103D, 103E

For the appellant - N Chandran (Maidzuara Mohammed with him); M/s Logan Sabapathy & Co
For the respondent - Alex De Silva (S Shamalah with him); M/s De Silva

[Appeal from Court of Appeal, Civil Appeal No: J-W-02-1199-2005]

Reported by WA Sharif

JUDGMENT

Abdul Aziz Mohamad FCJ:

[1] Pursuant to a complaint concerning the respondent's conduct as an advocate and solicitor, the Disciplinary Board appointed a Disciplinary Committee by virtue of para. (a) of s. 103A of the Legal Profession Act 1976 ("the Act") without constituting an Investigating Tribunal under s. 100 to investigate into the complaint and report its findings to the disciplinary board. Taking the stand that this was wrong, the respondent, after the Disciplinary Committee had commenced to hear the complaint, brought proceedings in the High Court for declarations to invalidate the disciplinary proceedings brought against him so far and for an injunction to stop further proceedings against him by the Disciplinary Committee. The respondent succeeded in the High Court and also, on appeal by the appellant Disciplinary Board, in the Court of Appeal.

[2] In the High Court and the Court of Appeal it was agreed that there was only one main issue to be decided in this case, namely:

> Whether the defendant can proceed with a complaint made against the plaintiff, by appointing a Disciplinary Committee without first appointing an Investigating Tribunal to inquire into the complaint and submit a report, pursuant to the provisions of the Act.

[3] The appellants were granted leave to appeal to this court on the following question:

whether, on the express provisions under Sections 103A and 103B of the Legal Profession Act, 1976 [Act 166] ("LPA"), the Disciplinary Board is vested with an independent and distinct power to appoint a Disciplinary Committee forthwith under any one of the circumstances as set out in Section 103A LPA?

[4] Disciplinary proceedings against advocates and solicitors are regulated by a number of sections in Part VII of the Act. Major changes in the disciplinary hierarchy and procedure were effected by the Legal Profession (Amendment) Act 1992 (Act A812) through the substitution of ss. 93 to 103 of the Act, which are in Part VII, with new provisions and the addition in that Part of new ss. 103A to 103E. Several of those new ss. 93 to 103E were later amended by the Legal Profession (Amendment) Act 1993 (Act A861). Further major changes in hierarchy and procedure, including the abolition of the Investigating Tribunal, were effected by the Legal Profession (Amendment) Act 2006 (Act A1269) which came into force on 2 October 2006, but they do not affect the case of the respondent because, by virtue of s. 35 of that Act, his case continues to be governed by the applicable provisions as they stood before Act A1269 came into force. Therefore the provisions of the Act that we will be referring to are provisions introduced by Act A812 as amended by Act A861 but as unamended by Act A1269.

[5] The Disciplinary Board is established under s. 3. Section 94(1) vests it with control over all advocates and solicitors "for the purposes of all disciplinary actions". Section 94(2) lays down the penalty for "misconduct": striking off the roll or suspension for a period. Section 94(3) defines "misconduct". It includes "conviction of a criminal offence which makes him unfit to be a member of his profession". Section 94(4) provides that in certain circumstances pertaining to an advocate and solicitor, such as where he is found guilty by a court of law of any offence involving dishonesty, the Bar Council, the governing body of the Malaysian Bar, may apply to the Disciplinary Board for an order suspending him from practice until further notice, if the Bar Council considers that such suspension "would be in the public interest or in the interest of his clients or of the profession".

[6] Section 95 requires, for the purposes of disciplinary proceedings under Part VII of the Act, that there be established a Disciplinary Committee Panel "with a Disciplinary Committee established under it" and an Investigating Tribunal Panel "with an Investigating Tribunal established under it". Those Panels are appointed by the Disciplinary Board under ss. 96 and 97.

[7] By s. 99(1) any complaint concerning the conduct of an advocate and solicitor must in the first place be made or referred to the Disciplinary Board. By s. 100(1) the Disciplinary Board "shall, if it considers that there is merit in the ... complaint, forthwith constitute an Investigating Tribunal", and that is done by appointing, under s. 100(2), three members from the Investigating Tribunal Panel. That was not done in this case and that was what the respondent contended the appellants should have done.

[8] The duty of the Investigating Tribunal is, according to s. 101(1), to investigate into the complaint and report its findings to the Disciplinary Board, and also, according to s. 102(1), to make any one of three recommendations, two of which are either that a formal investigation is not necessary or that there should be a formal investigation by a Disciplinary Committee. Section 102(2) provides as follows:

> (2) If the Investigating Tribunal in its report recommends:
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> (a) that there should be a formal investigation, then the Disciplinary Board shall constitute a Disciplinary Committee; or
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> (b) that a formal investigation by a Disciplinary Committee is not necessary, the Disciplinary Board may, if it disagrees with the recommendation, appoint a Disciplinary Committee.

[9] Section 103A provides as follows:

> 103A. Where
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> (a) the Disciplinary Board determines that there should be a formal investigation; or
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> (b) an advocate and solicitor has been convicted of an offence of criminal breach of trust under section 409 of the Penal Code [Act 574] or any other offence involving fraud or dishonesty; or

A (c) the advocate and solicitor has been suspended under section 94(4) of this Part,

the Disciplinary Board shall forthwith appoint a Disciplinary Committee which shall hear and investigate the matter.

B It was in reliance on para. (a) that the appellant Disciplinary Board appointed the Disciplinary Committee in this case.

[10] Section 103B provides as follows:

C 103B. (1) The Disciplinary Board shall appoint a Disciplinary Committee to consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal, or to investigate and make recommendations to the Disciplinary Board in respect of cases under section 103A.

D (2) A Disciplinary Committee shall consist of three members of whom [sic] shall be:

(a) two advocates and solicitors; and

(b) one lay persons [sic],

E appointed from the Disciplinary Committee Panel.

(3) The Disciplinary Board shall appoint a member from paragraph (a) of subsection (2) to be the chairman of the Disciplinary Committee.

F **[11]** Section 103C sets out the choice of recommendations one of which the Disciplinary Committee is required to make to the Disciplinary Board according to the recorded findings of fact that it has made after "hearing and investigating any matter referred to it". Section 103D provides for the orders that the Disciplinary G Board may make after considering the report of the Disciplinary Committee.

[12] The respondent rightly accepted, as the High Court and the Court of Appeal rightly thought, that in the circumstances H mentioned in paras (b) and (c) of s. 103A the Disciplinary Board may appoint a Disciplinary Committee directly without first constituting an Investigating Tribunal under s. 100(1). The reasons are not difficult to see. As regards para (b), conviction of a criminal offence which makes an advocate and solicitor unfit to be a I member of his profession is, as s. 94(3) says, a misconduct; and for it disciplinary proceedings may be taken against him. The fact

that para (b) singles out conviction of specific offences of that nature means that a case of conviction of any of the specific offences is to be subject to a different disciplinary procedure from cases of conviction of other offences of that nature, that is, a procedure where a Disciplinary Committee is appointed directly without an Investigating Tribunal having first to be constituted. As regards para (c), there can be no question of having to appoint an Investigating Tribunal because, as has been seen, a suspension under s. 94(4) comes about not from a complaint to the Disciplinary Board but from an application by the Bar Council for suspension. Therefore the question that we had to answer actually turned on the circumstance in para (a) of s. 103A. We answered the question in the affirmative and allowed the Disciplinary Board's appeal.

[13] It was for a combination of three reasons that we were of opinion that in the circumstance in para (a) of s. 103A the Disciplinary Board is vested with "an independent and distinct" power to appoint a Disciplinary Committee, that is, a power that is independent of and distinct from its power or duty under s. 102(2) to appoint a Disciplinary Committee, which arises only after the Investigating Tribunal has made its report and which therefore cannot arise unless an Investigating Tribunal has been constituted.

[14] The first reason is this. The requirement of s. 103A that "the Disciplinary Board shall forthwith appoint a Disciplinary Committee which shall hear and investigate the matter" is, as the section is drafted, a requirement that applies equally to each of the circumstances in paras (a), (b) and (c). Since the power to appoint that is implicit in that requirement is independent of and distinct from the power to appoint under s. 102(2) where the circumstances in paras (b) and (c) are concerned, it must be so too where the circumstance in para (a) is concerned. There could not have been intended a severance, splitting or dichotomizing of the quality of the power according to which of the three circumstances it is that may be in question.

[15] For the second reason, it is expedient to first quote what Zulkefli Makinudin JCA, speaking for the Court of Appeal panel, said: "The phrase 'a formal investigation' found in … s. 103A(a) has appeared earlier in ss. 102 and 103 of the Act … It is my view whether there should be a formal investigation or not as

envisaged by s. 103A(a) of the Act it must be subject to a report made by the Investigating Tribunal under s. 102(2) of the Act". In those words there seems to be a perception that the decision of the Disciplinary Board under para. (a) of s. 103A that there should be a formal investigation, upon which the section requires it to "forthwith appoint a Disciplinary Committee", is somehow related to what happens under s. 102(2), which involves the report of the Investigating Tribunal, or somehow flows from that section. It must be observed that in para. (a) of s. 103A the word is "determines". The Disciplinary Board determines that there should be a formal investigation. Section 102(2) has two paragraphs. Under para. (a) the Disciplinary Board is bound to constitute a Disciplinary Committee if the investigating tribunal recommends that there should be a formal investigation. There is no question under that paragraph of the Disciplinary Board determining that there should be a formal investigation. Under para. (b) the Disciplinary Board is given the discretion to nevertheless appoint a Disciplinary Committee, even where the investigating tribunal recommends that a formal investigation is not necessary, if it disagrees with the recommendation. Of course the disagreement with the recommendation means that the Disciplinary Board thinks or takes the view that a formal investigation is necessary, but para. (b) does not speak of the Disciplinary Board determining that there should be a formal investigation. We were of the view that the word "determines" in para. (a) of s. 103A is intended to denote the making of a decision by the Disciplinary Board on its own volition and not as a response under s. 102(2) to a recommendation of the Investigating Tribunal. That is the second reason.

[16] The third reason lies in s. 103B(1). Section 103B is basically intended to set out the composition of the Disciplinary Committee, which has not been set out before, whereas the composition of an Investigating Tribunal has been set out in s. 100(2). As the duty to appoint a Disciplinary Committee has been laid down in ss. 102(2) and 103A, and in view of its contents, s. 103B(1) is basically intended to be a recapitulation of the instances, already laid down in ss. 102(2) and 103A, when the Disciplinary Board "shall" appoint a Disciplinary Committee, coupled with a statement of what the Disciplinary Committee has to do, and is not intended to provide for other instances of appointment of a Disciplinary Committee. Section 103B(1) looks to two instances of

appointment in terms of the purpose of the appointment. One instance is that of an appointment of a Disciplinary Committee to consider the report of the Investigating Tribunal. That applies "in cases where an Investigating Tribunal has been appointed". Those have to be cases where the appointment was pursuant to s. 102(2). The other instance is that of an appointment of a Disciplinary Committee to investigate and make recommendations to the Disciplinary Board in respect of cases under s. 103A. There is in one or two respects a want of consistency between s. 103B(1) on the one hand and ss. 102(2) and 103A on the other. For example, s. 103B says that in the first of the instances the Disciplinary Committee is "to consider … the report of the Investigating Tribunal" whereas the implication to be drawn from para (a) of s. 102(2) is that the Disciplinary Committee's function is to carry out a formal investigation. But this want of consistency does not detract from the fact that s. 103B(1) is intended to refer back to ss. 102(2) and 103A. The important thing to note from s. 103B(1) for the question in the appeal is that the first instance is of "cases where an Investigating Tribunal has been appointed". That means that the second instance, that of "cases under s. 103A", that is cases under all the three circumstances of the section, including the circumstance in para (a) thereof, are not cases where an Investigating Tribunal has been appointed. That is the third reason.

[17] The independent and distinct power of the Disciplinary Board to appoint a Disciplinary Committee in the circumstance of para (a) of s. 103A means that where the Disciplinary Board receives a complaint concerning the conduct of an advocate and solicitor it has an unfettered discretion to determine that there should be a formal investigation and to straight away appoint a Disciplinary Committee for the purpose and is not bound under s. 100(1) to "forthwith constitute an Investigating Tribunal" to make recommendations to it as to whether or not there should be a formal investigation by a Disciplinary Committee. One reason why the Court of Appeal was not in favour of the appellant's construction of s. 103A(a) is the absence of express provisions setting out the types of complaint to deal with which the Disciplinary Board may straight away act under the section and appoint a Disciplinary Committee instead of first appointing an Investigating Tribunal under s. 100(1). The Court of Appeal envisaged that disputes might arise on the question, the

A determination of which would require the court "to insert words into the Act", and "this would go clearly against all principles of statutory interpretation". Once, however, it is accepted that the Disciplinary Board has an unfettered discretion to act under s. 103A(a), the concern expressed by the Court of Appeal would
B not arise. It is true that the provisions that involve the Investigating Tribunal would become a dead letter if in every case the Disciplinary Board chooses to act under s. 103A(a), but that is the inevitable consequence of the manner in which, in our judgment, the section has to be construed, and such a
C consequence ought not to inhibit such a construction.

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